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15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

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28 **MIYOKO'S KITCHEN,** Plaintiff,
v.
**KAREN ROSS, in her official capacity as
Secretary of the California Department of
Food and Agriculture, and STEPHEN
BEAM, in his official capacity as Branch
Chief of the Milk and Dairy Food Safety
Branch,** Defendants.

3:20-cv-00893-RS

**DECLARATION OF DR. STEPHEN
BEAM IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Date: August 13, 2020¹
Time: 1:30 p.m.
Courtroom: 3
Judge: Honorable Richard Seeborg
Trial Date: Not Set
Action Filed: February 6, 2020

¹ This motion is noticed motion under Northern District of California Local Rule 7-2, with hearing automatically vacated pursuant to Northern District of California General Order 72.

1 I, Stephen Beam, declare:

2 1. I am the Chief of the Milk and Dairy Food Safety Branch of the California
3 Department of Food and Agriculture. In that official capacity I am a defendant in this action.
4 The statements contained in this Declaration are based on my own personal knowledge and if
5 called to testify I could and would competently testify thereto. This is my second declaration in
6 this matter.

7 2. I have held my current position for 16 years, and I have worked at the Department of
8 Food and Agriculture (“the Department”) for nearly 21 years. I hold a Ph.D. in Animal Science
9 from Cornell University.

10 3. The Department is responsible for the application and enforcement of state and
11 federal statutes and regulations concerning food labeling. Among these statutes and regulations
12 are standards of identity. A standard of identity is a definition of a type of food based on
13 commonly used names. Standards of identity apply to all kinds of foods, including grain
14 products, meats, dairy products, and substitutes for dairy products. It is the policy of the
15 Department to enforce these rules across all food industries.

16 4. Although all food industries are governed by standards of identity, the Department’s
17 practices for how to enforce standards of identity are tailored to specific industries. In the case of
18 dairy products and products that resemble dairy products, state statutes require review and
19 approval of labels by the Department prior to their use.

20 5. The Milk and Dairy Food Safety Branch (“the Branch”) is responsible for the
21 Department’s review and approval of food labels for milk, frozen and cultured dairy products,
22 cheese, and products resembling milk products. California Food and Agricultural Code section
23 32912.5 assigns this duty to the Department, and the Department assigns it to the Branch.

24 6. The Milk and Dairy Food Safety Branch receives thousands of labels for approval
25 each year. During the period of January 1, 2019 through May 31, 2020, the Branch reviewed
26 over 3,000 labels, about 10% of which required revision. The Branch sent over 90 letters during
27 this period informing manufacturers that compliance with regulations required changes to their
28 labels.

1 7. The system of standards of identity allows the Department to regulate a large number
 2 of products by applying uniform rules across entire sectors. Relying on standards of identity
 3 rooted in ordinary usage, most of which have a long history as recognized names for food, allows
 4 the Branch to review and approve a large volume of labels each year. This serves the statutory
 5 mandate, *see* Cal. Food & Agric. Code §§ 32701, 32912.5, 32913, 32914 & 38902, of preventing
 6 false, misleading, and deceptive marketing and unfair competition while maintaining a level
 7 playing field. In the context of butter, this means that products traditionally understood as
 8 butter—made from milk or cream and 80% milk fat—are identified as butter. Other products—
 9 whether they contain some dairy ingredients or not—may not be called butter.

10 8. For the most part, the Department and the California legislature have limited
 11 discretion concerning standards of identity. With few exceptions, federal law preempts state law,
 12 setting nationwide standards of identity. States have the power to determine their own method of
 13 enforcement, and states may decline to enforce standards of identity altogether, but states cannot
 14 enforce standards of identity contrary to federal statutes and regulations.

15 9. Because federal and state law separately defines butter alternatives such as margarine
 16 and spreads, the Branch reviews and approves labels for “products resembling milk products” but
 17 does not review labels for margarines or spreads. This does not mean margarines and spreads are
 18 exempt from regulation; they may still be subject to enforcement for misbranding. But those
 19 labels need not be approved by the Branch.

20 10. Products labeled as “butter,” whether they are made from milk or cream, made from
 21 plants with some dairy product added, or made entirely from plants are subject to review by the
 22 Branch.

23 11. Based on my experience and my review of Department records, Miyoko’s was the
 24 first 100% plant-based product the Department reviewed that identified itself as butter.² Since
 25 receiving Miyoko’s label, the Department has also received labels for additional products
 26 identified as butter that do not satisfy the standard of identity for butter.

27 2 Conversely, I am unaware of any producer whose product that satisfied the standard of
 28 identity for butter seeking approval of a label that does not identify the product as “butter.”

1 12. The Department's position is that it is required by state statutes to approve or require
 2 modification to Miyoko's labels, and that under relevant federal law and regulations, including
 3 the federal standard of identity for butter, codified at 21 U.S.C. § 321a, and the federal description
 4 of the misbranding of food, 21 CFR § 101.18, Miyoko's label is not permissible.

5 13. The Department sent the letter dated December 9, 2019 (ECF No. 1-1) to Miyoko's,
 6 stating the Department's position that the product cannot be identified as "butter."

7 14. Consistent with the confidentiality requirement stated in California Food and
 8 Agricultural Code Section 38946, the Department sent the December 9 letter only to Miyoko's.
 9 The Department did not publicize the letter.

10 15. The December 9 letter was not the result of a request or other comment originating
 11 outside the Department asking for enforcement against Miyoko's. The Department received no
 12 such request.³

13 16. The Department is aware that there are other types of products that use the term
 14 butter, including peanut butter and fruit butters. These products have been sold for decades and
 15 have their own federal standards of identity. Both peanut butter and fruit butter have federal
 16 standards of identity dating back to the 1970s. *See Peanut Butter*, 21 CFR §§ 164.110 (first
 17 promulgated by Tree and Peanut Products, 42 Fed. Reg. 14,475 (March 15, 1977)), *Fruit Butter*,
 18 21 C.F.R. § 150.110 (first promulgated by *Fruit Butter*, 42 Fed. Reg. 14,445 (March 15, 1977)).
 19 These terms describe ingredients in the products (peanuts, fruit). The Department acknowledges
 20 that the federal government made a distinction based on ordinary usage and history to assign
 21 standards of identity to peanut butter and fruit butters through a federal rulemaking process, and
 22 the Department applies those standards of identity.

23 17. The use of dairy terms is not the only aspect of a product label that the Branch
 24 reviews. The Department also requires that labels be truthful. For example, the Department does
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³ After Miyoko's filed this lawsuit, the Department received one email from a trade
 27 association concerning Miyoko's. That email message included, as an attachment, a publicly
 28 available document submitted to the federal Food and Drug Administration seeking regulatory
 action concerning the labeling of dairy substitute products. The Department has already provided
 a copy of this email exchange to Miyoko's.

1 not approve labels that use the phrase “hormone free” for products that contain hormones. The
2 Branch applies this principle to dairy and plant-based products.

3 18. For Example, the Department is aware of consumer concern over the use of rBST, an
4 FDA-approved artificial growth hormone injected into cows to increase milk production. For
5 manufacturers wanting to market products made from the milk of cows not treated with rBST, the
6 Branch has approved labels that clearly state that the products were made from cows not treated
7 with rBST.

8 19. Miyoko’s label claims that the product is hormone free. The Department understands
9 this claim is not true; the plants used to make Miyoko’s “vegan butter” product contain
10 endogenous hormones. The December 9 letter identifies this concern and asks Miyoko’s to
11 change its label.

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13 I declare that the foregoing statements are true and correct under penalty of perjury.
14 Executed this day, July 16, 2020, in Sacramento, California.

15

/s/ Stephen Beam
STEPHEN BEAM

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18 As the attorney e-filing this document, attorney Michael S. Dorsi attests that Stephen
19 Beam has concurred in the filing of this document. */s/ Michael S. Dorsi*
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